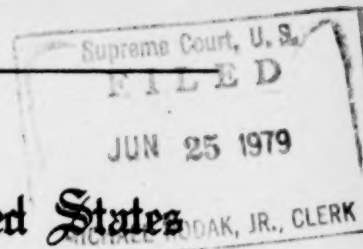

In The

Supreme Court of the United States



October Term, 1978

No. 78-1781

In the Matter

of

JACOB P. LEFKOWITZ,

Bankrupt-Petitioner.

**BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI**

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REASONS FOR DENYING THE WRIT

This brief is submitted on behalf of Jerome Schulman as Trustee in Bankruptcy of Jacob P. Lefkowitz, Bankrupt, in opposition to the petition of Jacob P. Lefkowitz for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

The petitioner has based his application for a writ of certiorari upon the following questions (the response to these questions follow each of the questions):

QUESTIONS PRESENTED AND RESPONSE THERETO

Question 1.

Does the Bankruptcy Act and Rules require the bankrupt to first prove the adequacy of his financial records where admittedly no records were destroyed or concealed and the bankrupt produced *all primary or original records*, such as, checkbooks, deposit slips, bank statements, cancelled checks and the like, *before* a party objecting to his discharge need demonstrate the facts essential to the objection?

Response:

The petitioner contends that since he produced a large quantity of records, consisting of checkbooks, deposit slips, bank statements and cancelled checks that that fulfilled his obligation to maintain books of account or records from which his financial condition and business transactions might be ascertained, as required by Section 14c(2) of the Bankruptcy Act. The fact of the matter is that the petitioner maintained no books of account and the records that he produced failed to comply with the requirements of said Section as shall hereinafter appear.

The checkbooks produced by the petitioner indicated bank accounts in approximately six different banks. They failed to indicate in any manner whatsoever, the deposits made in the account, the source thereof, or the nature and purpose of the withdrawals of moneys except as indicated by the payee on the checks.

The deposit slips maintained by the petitioner indicated deposits in his several bank accounts which for the years 1973 and 1974 totalled \$1,257,109.49. An examination of the deposit slips indicated that the majority of the deposits were made in

cash and failed to reflect the source of the deposits. In 1973 only six deposit slips out of several hundred indicated the source of the cash deposit. In 1974 only one deposit slip indicated the source of the cash deposit.

The petitioner maintained that he kept a record of receipts received from his clients in his diary or in his deposit slips. The diaries produced by petitioner failed to indicate any list of clients except entries therein referring to a pending matter. The deposit slips failed to indicate the names of the clients except in the few instances referred to.

The petitioner's federal income tax returns for the years 1973 and 1974 disclosed that petitioner, an attorney-at-law, had a gross income of \$188,700 in 1973 and \$140,819 in 1974. The income tax returns failed to indicate the source of the deposits or the disposition of the moneys received by him except in general terms.

It is obvious that the records produced by the petitioner failed substantially to indicate his financial condition and business transactions.

Question 2a:

Whether the court below erred, by misconstruing and misapplying Section 14(c) of the Bankruptcy Act, 11 U.S.C. Section 32(c) (1976), and Congress' intent by imposing an unduly harsh standard as to the adequacy of the bankrupt's books and records merely because of his profession, unjustly denying the bankrupt his discharge?

Response:

Petitioner urges that Rule 407 of the Bankruptcy Rules places the burden of proving the facts essential to an objection on the objector. This in no way relieves the petitioner of his

burden of producing adequate records. See Advisory Committee Note to Rule 407; *In the Matter of Martin*, 554 F. 2d 55, 58 (2d Cir. 1977), *cert. dismissed*, 434 U.S. 801 (1978).

In the case of *In re Underhill*, 82 F. 2d 258, 260 (2d Cir.), *cert. denied*, 299 U.S. 546 (1936), the Court held:

"Records of, substantial completeness and accuracy are required so that they may be checked against the mere oral statement of explanations made by the bankrupt. [Citation omitted.]"

There is nothing in the record which indicates that the bankruptcy judge placed any burden on the petitioner forbidden by Rule 407 of the Bankruptcy Rules. The records produced by the petitioner did not meet the statutory mandate which required him to produce records from which his financial condition and business transactions might be ascertained.

Under Rule 752 of the Rules of Bankruptcy Procedure the findings of fact of a bankruptcy court should not be set aside unless clearly erroneous and due regard should be given to the opportunity of the trial court to judge the credibility of the witnesses. Rule 810 of the Rules of Civil Procedure contains a similar provision.

In the case of *Simon v. Agar*, 299 F. 2d 853, the Court of Appeals for the Second Circuit, in interpreting General Order 47, the predecessor of these rules, said the following:

"It is too well settled to require the citation of authorities that where an appeal brings up for review concurrent findings of fact by the referee and the district court, they can be set aside only if 'clearly erroneous'. See Bankruptcy General Order 47, 11 U.S.C.A. following section 53; Rule 52(a) F. R. Civ. P., 28 U.S.C.A. Particularly is

this true where, as in this case, the findings involve questions of credibility of witnesses who testified before the referee. See *Morris Plan Industrial Bank v. Henderson*, 2 Cir., 131 F. 2d 975, 977; *Margolis v. Nazareth Fair Grounds & Farmers Market, Inc.*, 2 Cir., 249 F. 2d 221, 223; *Smith v. United States*, 5 Cir., 287 F. 2d 299, 301. Appellant has not carried his burden of convincing us that both essential findings are clearly erroneous."

The findings of the bankruptcy court have been sustained by the district court and the court of appeals.

Question 2b:

Considering the rehabilitative intent of the Bankruptcy Act, did the court below err in failing to remand, to permit the bankrupt to organize, *i.e.*, write up in ledgers his primary or original records so that these secondary ledgers or records would then reflect his financial condition and business transactions?

Response:

Petitioner is requesting the Court to permit him to write up books of account from his primary or original records. The testimony was clear at the hearing that the primary records produced by petitioner were insufficient to indicate the petitioner's financial condition and business transactions and his recollection of these transactions were not adequate under the law to permit him to write up books of account without corroborative written records.

Petitioner has failed to set forth any grounds upon which a petition for a writ of certiorari should be granted.

CONCLUSION

Wherefore it is respectfully submitted that the application by petitioner for a writ of certiorari to the United States Court of Appeals for the Second Circuit be denied.

Respectfully submitted,

s/ Michael Berman
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Jerome Schulman